



(916) 324-1084

## MEMORANDUM

TO: Seniors and Above

FROM: Robert P. Hoffman  
Chief Counsel

DATE: February 29, 1996

SUBJECT: Department of Fish and Game California Environmental Quality Act Filing Fees Reinstated

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The Governor's Office of Planning and Research, State Clearing House (SCH) has informed us that the Department of Fish and Game (DFG) has reinstated collection of California Environmental Quality Act (CEQA) fees effective immediately. The SCH will again require the payment of \$850.00 in conjunction with the filing of a Notice of Determination (NOD) for a project for which an Environmental Impact Report (EIR) was prepared, and \$1250.00 for the filing of a NOD for a project involving a Negative Declaration. All checks submitted to the SCH in conjunction with the filing of an NOD should be made payable to the "California Department of Fish and Game."

This memorandum supersedes the Department of Toxic Substances Control Policy and Procedure Document # EO-95-005-PP entitled "Notice of Determination: Filing Fees Required by the California Environmental Quality Act (CEQA) and the Fish and Game Code," dated November 15, 1995. An updated Policy and Procedure memorandum will be forthcoming.

The DFG environmental review fees were imposed to defray the cost of managing and protecting fish and wildlife trust resources, including consulting with other public agencies, reviewing environmental documents, recommending mitigation measures, and developing monitoring requirements for purposes of CEQA. These fees were challenged in 1991 and collection was suspended in June 1995 on the basis of a settlement agreement between DFG and the litigant. However, the court has now ordered these fees back in effect as a result of subsequent litigation. (See the attached chronology).

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Prospective collection of fees is in effect, NODs received without the required fee will be returned and will not be accepted until the fee is paid. At this time retroactive collection of fees is not required.

If you have any questions, please contact Rick Moss, Chief, Office of Program Audits and Environmental Analysis at (916) 324-0845 CALNET 8-454-0845.

Attachment

## ENVIRONMENTAL FILING FEE CHRONOLOGY

- C In 1991, *Mills v. Department of Fish and Game et al.*, Sacramento Superior Court case number 529928 (“Mills”) was filed. This litigation challenged the constitutionality of the fees that were established by the Legislature (AB 3158 - Costa) for DFG’s review of environmental documents. These fees were codified at Fish and Game Code section 711.4.
- C After a week-long trial in 1994, Judge Jeffrey Gunther issued a tentative ruling in which he determined that the fees were unconstitutional taxes and that, as such, they had to be enacted with a two-thirds vote of the Legislature to meet the requirements of Proposition 13.
- C Based on the tentative ruling, in June, 1995, DFG entered into a settlement agreement with the Plaintiffs in that case. The settlement included a provision under which DFG agreed to advise lead agencies to stop collecting the fees. This settlement was embodied in a Stipulation and Order (“Order”) issued by Judge Gunther. Based on this Order, DFG issues its June, 1995 notice to lead agencies.
- C In October 1995, the provisions of the Order were challenged in a case titled *California Association of Professional Scientists et al. V. Department of Fish and Game et al.*, Sacramento Superior Court case number 95 CS 02523 (“CAPS”). CAPS alleged that the provisions of the Order that advised lead agencies to stop collecting the fees violated article III, section 3.5 of the California Constitution. This article, in essence, says that an administrative agency, like DFG, cannot refuse to enforce a statute based on its unconstitutionality as determined by a Superior Court. It can only do so based on an Appellate Court determination. The Plaintiffs in the Mills case intervened in the CAPS case.
- C After trial in the CAPS case, Judge Gunther restated his view that the fees were unconstitutional, but he determined that the Order in the Mills case violated article III of the Constitution and vacated the settlement to the extent that it included a provision under which the fees were to stop being collected. In addition, he issued a final decision in the CAPS case that said that the Department must resume collection of the filing fees. He ruled that collection must be prospective, as well as retroactive from the date of the Order.
- C DFG has appealed Judge Gunther’s decision that the fees must be collected retroactively. Because of this appeal, the retroactive collection of the fees has been stayed. In addition, the Plaintiffs in the Mills case have appealed the CAPS decision in its entirety. However, this appeal does not stay the prospective collection of the fees.